STATE OF MICHIGAN

COURT OF APPEALS

RONALD R. GILBERT, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED April 16, 2002
v JANE JOHNSON GILBERT, Defendant/Counter-Plaintiff-Appellee.	No. 228354 Wayne Circuit Court LC No. 99-937496-DO
RONALD R. GILBERT, Plaintiff-Appellant,	
v JANE JOHNSON GILBERT, Defendant-Appellee.	No. 231756 Wayne Circuit Court LC No. 00-035781-CZ

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of divorce and the trial court's grant of summary disposition in favor of defendant. We affirm the trial court's decisions, but remand for a correction of the amount of attorney fees awarded in the judgment of divorce.

I. Attorney Fees

Plaintiff first challenges the trial court's decision to award attorney fees to defendant. Specifically, plaintiff argues that the antenuptial agreement accepted by the trial court provided that each party would pay his or her own attorney's fees and costs. Furthermore, plaintiff argues that defendant failed to demonstrate an inability to bear the burden of litigation. We disagree. A trial court's decision to award attorney fees is reviewed for an abuse of discretion. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). However, "[w]e review a trial court's

decision regarding the imposition of a sanction to determine if it is clearly erroneous." *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997).

In a divorce proceeding, attorney fees are appropriate based either on financial need or on a party's unreasonable conduct that serves to increase the cost of litigation. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). In the present case, the trial court cited plaintiff's unreasonable conduct and its authority to sanction plaintiff for frivolous pleadings. The trial court found that the portion of the antenuptial agreement barring attorney fees did not include attorney fees awarded in the form of sanctions. Indeed, a court must sanction an attorney under MCR 2.114 for filing frivolous pleadings. *In re Goehring*, 184 Mich App 360, 367; 457 NW2d 375 (1990).

Plaintiff disagrees with the trial court's finding that his pleadings were frivolous. Indeed, a review of the record reveals numerous pleadings that were without legal basis and appeared to have the sole purpose of harassing defendant. As such, the trial court did not err in awarding defendant attorney fees.

We note, however, that there was a mathematical error in the calculation of attorney fees by the trial court. The trial court awarded attorney fees at a rate of $175.00 an hour. However, the affidavit the trial court relied upon to assess attorney fees was based on a rate of $200.00 an hour. Applying the rate of $175.00 an hour, plaintiff is responsible for $11,935.00 in attorney fees plus costs of $958.00.[1]

II. Due Process

Plaintiff next maintains that he was denied his due process rights**.** In civil proceedings, the right to due process usually requires notice and an opportunity to be heard. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). Notice must be given to the party in a manner reasonably calculated to apprise the party that the action will be heard and to allow an opportunity to present objections. *Vicencio v Ramirez*, 211 Mich App 501, 504; 536 NW2d 280 (1995).

A. Trial on Attorney Fees

Plaintiff alleges that the trial court granted attorney fees, during a trial on May 11, 2000, without offering him the opportunity to be heard in a meaningful manner. We disagree. The record shows that plaintiff filed a motion the day before trial seeking an adjournment. Thus, the issue is whether the trial court properly denied plaintiff's motion to adjourn. We review a trial court's denial of a motion to adjourn for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). A trial court may grant a motion to adjourn for good cause and

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[1] The total number of hours billed was 84.10. At a rate of $175.00 an hour this amounts to $14,717.50, as opposed to the $16,820.00 used by the trial court. Thus, the total amount of attorney fees at a rate of $175.00 an hour ($14,717.50) plus costs ($958.00) amounts to $15,675.50. Subtracting the inapplicable attorney fees as stated by the trial court ($2,782.50) from $15,675.50, plaintiff is responsible for $12,893.00.

to promote the cause of justice. MCR 2.503(B)(1) and (D)(1); *Soumis v Soumis*, 218 Mich App 27, 32; 553 NW2d 619 (1996).

If plaintiff had attended the trial on May 11, 2000, he would have had the opportunity to be heard. Moreover, we find that the trial court did not abuse its discretion when it denied plaintiff's motion to adjourn. Indeed, plaintiff did not request the adjournment until the day before trial. The record also reveals that the trial had already been delayed by plaintiff's prior actions. Further, plaintiff's claim that he was physically unable to withstand the stress of trial was not credible. Because plaintiff had an opportunity to be heard on the issue of attorney fees, his due process rights were not denied.

B. New Trial

Plaintiff also argues that his due process rights were denied because he was not notified when the trial court changed the hearing date on his motion for new trial. We disagree. Plaintiff claims that he received notice that the trial was set for June 30, 2000 and not June 16, 2000. The right to notice of a hearing is dependant upon the right to an opportunity for a hearing. *Van Slooten v Larsen*, 410 Mich 21, 55; 299 NW2d 704 (1980).

It is unclear from the lower court record when plaintiff received notice that the hearing was changed to June 16, 2000. However, the trial court stated on the record that plaintiff was notified of the hearing. The trial court also noted that there was no reason to further delay the hearing because the judgment of divorce had already been entered. Nonetheless, because this hearing involved a motion for a new trial it was governed under MCR 2.611. This court rule does not require a hearing and the trial court has discretion to accept new testimony. MCR 2.611(A)(2)(b) and (G). While the trial court held a hearing in this case, it rendered its opinion solely on the briefs and declined to hear oral argument from defendant to ensure that plaintiff was treated fairly. Therefore, plaintiff's due process rights were protected.

III. Signature Requirement

Plaintiff also argues that defendant violated MCR 2.114(C)(1) by failing to sign the countercomplaint. We disagree. "The construction and interpretation of court rules is a question of law that we review de novo." *Barclay v Crown Bldg & Dev, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

A trial court must strike unsigned documents unless they are promptly signed after the party is made aware of the error. MCR 2.114(C)(2). However, there is a signed countercomplaint in the lower court record. We also note that the trial court acknowledged on the record that the countercomplaint had been signed and that plaintiff was on notice as to its allegations. Therefore, plaintiff has failed to establish a violation of MCR 2.114(C)(1).

IV. Partial Summary Disposition

Plaintiff next challenges the trial court's granting of partial summary disposition to defendant on the ground that the antenuptial agreement between the parties was not in evidence. We disagree. A trial court's decision to grant or deny summary disposition is reviewed de novo on appeal. *Speik v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court

may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party must submit affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b).

A trial court may grant summary disposition on a contract if its terms are unambiguous, *Michaels v Amway Corp*, 206 Mich App 644, 649; 522 NW2d 703 (1994), and there is no evidence creating any other issue of fact. *Workers' Disability Compensation Bureau Director v Durant Enterprises, Inc*, 195 Mich App 626, 628-629; 491 NW2d 584 (1992). The burden is on the spouse challenging the enforceability of the antenuptial agreement to show that it was not enforceable. *Booth v Booth*, 194 Mich App 284, 289; 486 NW2d 116 (1992). In the present case, plaintiff did not claim that the terms of the antenuptial agreement were ambiguous; rather, he claimed that defendant fraudulently induced him to sign the agreement. An antenuptial agreement is unenforceable if: (1) it was obtained through fraud, duress, mistake, misrepresentation, or nondisclosure; (2) it was unconscionable when entered into; or (3) circumstances have changed so that it is unfair and unreasonable at the time of divorce. *Id*. at 288-289.

Plaintiff's allegations that defendant used "sexual favors" to induce him to marry her do not constitute fraud regarding the agreement. Plaintiff also claimed that defendant promised to repay him the money he gave her if their relationship ever ended. However, "[f]uture promises are contractual and cannot constitute actionable fraud." *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997); *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 444; 505 NW2d 275 (1993). Thus, the trial court properly upheld the validity of the antenuptial agreement and summary disposition was appropriate.

V. Assault and Battery Claim

Plaintiff also alleges that the trial court erred in granting summary disposition on his assault and battery claim. We disagree. Specifically, plaintiff alleges that the provision in the divorce judgment barring further claims between the parties was an invalid release because it lacked consideration. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden, supra* at 118. "The applicability of the doctrine of res judicata is a question of law that we also review de novo." *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001).

The trial court held that plaintiff's claim was barred by a provision in the divorce judgment that purported to adjudicate all claims, known and unknown, between the parties. Plaintiff mischaracterizes this provision as a release; however, a release, unlike a judgment, requires a knowing agreement between two parties. *Wyrembelski v St Clair Shores*, 218 Mich App 125, 127; 553 NW2d 651 (1996). Conversely, defendant claimed that the judgment had a res judicata effect on all claims between the parties.

Res judicata applies when: (1) the prior action was decided on the merits; (2) the issues raised in the second case were or could have been decided in the first case; and (3) the actions involved the same parties or their privies. *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 395-396; 573 NW2d 336 (1997).

A careful review of the record in this case reveals that plaintiff raised the issue of assault in his pleadings before the judgment of divorce was entered. Indeed, plaintiff presented the same facts and evidence of the alleged abuse in his pleadings and during the assault proceedings. More importantly, the divorce judgment specifically stated that it adjudicated all claims that the parties may have had against each other. Because plaintiff's assault and battery claim arose out of his marriage to defendant and plaintiff raised the issue of assault in his pleadings during the divorce proceedings, we find that the trial court properly granted summary disposition.

We affirm the trial court's decisions in both cases, but remand to the trial court for a correction of the amount of attorney fees awarded in the divorce judgment. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jessica R. Cooper